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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-730

JAMES W. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on February 28, 1972, and (2) granting the petition. As grounds for this motion petitioner states the following.

After petitioner filed his petition for certiorari, the Court of Appeals for the Sixth Circuit decided *Phillips* v. *Neil*, 452 F.2d 337 (6th Cir. 1971). That decision

is in conflict with the holding below that petitioner's constitutional right to confrontation was not denied when Thomas Jeffrey, a key government witness, was allowed to testify as to the value of certain properties when his opinion was based on unauthenticated documents not admitted in evidence, not made available to petitioner and where petitioner did not have an opportunity to examine the author or the custodian of the documents. The instant case and *Phillips* v. *Neil*, *supra*, raise the fundamental constitutional issue of whether the confrontation clause prohibits the use at trial of documents where neither the author nor the custodian of the documents is available for cross-examination.

In *Phillips*, a habeas corpus case, the defendant claimed insanity as a defense to a charge of first degree murder. To rebut that defense the prosecutor read into evidence the defendant's hospital records relating to his mental condition. Since the jury convicted the defendant, the court of appeals appropriately observed that "the challenged reports appear to have been outcome-determinative." 452 F.2d at 347. The defendant attacked his conviction on the ground that the use of the hospital records violated his Sixth Amendment right to confrontation because the records had not been authenticated by their custodian nor by their author and the author had not been produced as a witness. The court of appeals agreed. It said:

> "At no point did the appellant have the opportunity to confront their author. We consider this to

> be precisely the sort of case which deserved the 'careful scrutiny' spoken of in *Green*. It is plain that we have before us a classic illustration of the efficacy of the Sixth Amendment guarantee of the right to confrontation and cross-examination." 452 F.2d at 347.

Additionally, in *Phillips* v. *Neil* the court emphasized that the prosecution could not justify its reliance on the reports.

> "It should be pointed out that the record contains no suggestion as to why the state chose to rely on hearsay evidence as rebuttal, instead of calling the authors of the reports to testify. The Supreme Court has made plain that death or other unavailability of important witnesses may justify exception to the right to cross-examination in certain circumstances. And, indeed, there may be other reasons why it might be desirable to deny a defendant the right to cross-examination. Absent a suggestion to the contrary, we may surmise that the chief value of the introduction of the reports in this case lay squarely in the fact that cross-examination was made impossible." *Id.*

Thus the court concluded that "we find not the 'indicia of reliability' discovered in *Evans*[1] but rather factors which indicate a distortion of the 'truth-determining process.'" 452 F.2d at 348.

A brief review of the relevant facts in this case reveals its sharp conflict with the decision of the

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[1] *Dutton* v. *Evans*, 400 U.S. 74 (1970).

Sixth Circuit in *Phillips* v. *Neil*.[2] In this case a crucial question was the value of certain oil and gas properties. Jeffrey evaluated those properties on the basis of records which were not in evidence and had not been authenticated by their custodians or their authors. Jeffrey's opinion was based on the data in those documents and thus the accuracy of the documents had a direct bearing upon the outcome of the trial. Yet at no time did petitioner have an opportunity to challenge the author of the documents as to their reliability or accuracy. Furthermore, there was no "indicia of reliability" of the documents. In fact there was strong reason to suspect their accuracy.

The books and records on which Jeffrey relied were furnished to him by one Fred L. Hall, who was not called as a witness. The significance of Hall's not being sworn nor put to the acid test of truth or perjury is highlighted by the following:

1. The books and records on which Jeffrey relied were from corporations owned and controlled

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[2] The fact that in *Phillips* the prosecutor read into the record the contents of the documents whereas in this case the contents were put before the jury through the opinion of an expert witness is of no consequence. The important fact is that in both cases the contents of the documents determined the outcome of the case and in neither case did the defendant have the right to confront the author of the documents. Compare *Dutton* v. *Evans*, *supra*, at 87; *see also Anderson* v. *United States*, 447 F.2d 833 (8th Cir. 1971) *cert. denied*, 40 U.S.L.W. 3399, February 22, 1972, (No. 71-690), where the court of appeals reversed nine counts because an appraiser testified as to the value of properties based on records not admitted into evidence.

by Fred Hall, who was personally responsible for, and executed, many of the documents.

2. Fred Hall was charged as a conspirator with petitioner.[1]
3. Before petitioner's trial, Fred Hall was severed and his trial postponed.
4. Less than two months after the verdict against petitioner *the charges against Fred Hall were dismissed on motion of the Government.*
5. Fred Hall is a brother of Ernest Hall, one of the chief witnesses for the government against petitioner.

These circumstances clearly raise a question as to the reliability of the documents. Even Jeffrey could not say whether the records were correct (App. 1254-56). Thus by not calling Fred Hall to authenticate the documents, the government insulated him from a cross-examination which might have cast doubt on the accuracy of the documents and thereby undermined Jeffrey's crucial testimony. There can be no doubt that the documents here were essential to the prosecution's case. Nor can there be any doubt that they lacked the "indicia of reliability" found in *Dutton* v. *Evans*, *supra*, at 89.

Thus the decision below is contrary to *Phillips* v. *Neil*, *Dutton* v. *Evans*, as well as the decisions cited in the petition for certiorari. The question presented here is an important, indeed fundamental question of constitutional dimension. The conflict among the cir-

[1] Hall was named in only one of two indictments involved.

cuits, as well as the differences among the judges in the Fifth Circuit, make it apparent that the issue must at some point be resolved by this Court; this case is an appropriate occasion on which to do so.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

J. EDWIN SMITH
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Houston, Texas
Attorney for Petitioner

CERTIFICATE OF GOOD FAITH

I, the undersigned, J. Edwin Smith, attorney of record for James W. Williams, pursuant to the provisions of Supreme Court Rule 58(2), state that the foregoing petition is presented in good faith, not for delay, and that the petition is restricted to the grounds set forth in Rule 58(2).

J. EDWIN SMITH